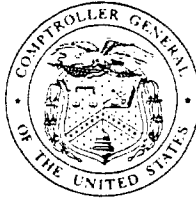


Parkinson
PLM-11

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-192082

DATE: December 21, 1978

MATTER OF: [Benefits for disability incurred in confinement]

- DIGEST:
1. An Army enlisted member sentenced by a court-martial to dishonorable discharge, confinement for life, reduction in grade, and forfeiture of all pay and allowances was retained in confinement past the expiration of his enlistment pending review of his sentence. On appeal his sentence was reversed in part and a rehearing held, which resulted in his conviction for the lesser offense involved in the earlier conviction. The reversal did not entitle him to "restoration" of pay and allowances under ~~10 U.S.C. 875(a)~~ for the period subsequent to the expiration of his enlistment, since his lack of entitlement to pay during that period due to the expiration of his enlistment, not the execution of a court-martial sentence. 40 Comp. Gen. 202 (1960).
 2. An Army enlisted member whose enlistment expired while he was in confinement pending appellate review of a court-martial sentence, *in person* was not entitled to pay subsequent to the expiration of his enlistment and, therefore, he is not entitled to disability retirement or severance pay under ~~10 U.S.C. 1201 or 1203~~ for a disability incurred during that period.
 3. If an enlisted member is restored to full duty status after expiration of his enlistment, pending appellate review of his court-martial sentence (which includes forfeiture of pay), he is entitled to pay while in the duty status.

This action is in response to a request by the Deputy Assistant Secretary of the Army by letter of May 26, 1978, with regard to the entitlement of a private (E-1) in the Army to pay and physical disability benefits from the Army.

The member entered the Army as a Regular enlistee on March 31, 1971, for an enlistment period of 2 years. On October 11, 1972, he

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was tried and convicted by a General Court-Martial for premeditated murder and violation of a lawful general regulation (unlawful possession of a Claymore mine). He was sentenced to a dishonorable discharge, confinement at hard labor for life, reduction to the lowest enlisted grade, and forfeiture of all pay and allowances. The sentence was approved on March 23, 1973. After intermediate review by the Army Court of Military Review, the findings and sentence were reversed on June 14, 1977, by the United States Court of Military Appeals with leave for a rehearing. In the interim, all rights, privileges and property of which the member had been deprived by his sentence were apparently restored under 10 U.S.C. 875 (1976). On rehearing the member was convicted of unlawful possession of a Claymore mine after dismissal of the murder charge by the military judge for lack of a prima facie case. He was sentenced on September 29, 1977, to forfeit \$150 per month for 3 months, hard labor for 30 days and reduced to the lowest enlisted grade. The sentence was approved and ordered executed on February 23, 1978, and forwarded to The Judge Advocate General for examination under Article 69, Uniform Code of Military Justice (10 U.S.C. 869 (1976)). Reportedly, the appointing authority's action reflects that the sentence to hard labor without confinement had already been served.

On October 4, 1977, the member was transferred to Fitzsimons Army Medical Center (FAMC), for examination and treatment. On October 20, 1977, a medical board found the member medically unfit for further military service by reason of chronic paranoid schizophrenia. The medical board further found that the member's mental disease originated in November 1974 when he was in confinement. The medical board recommended referral of the case to a physical evaluation board (PEB). The member's request for retention on active duty for physical disability processing under provisions of paragraph 2-6a, Army Regulation (AR) 635-200, was approved on November 28, 1977. The medical board findings and recommendations were approved on November 30, 1977, but were apparently suspended because of "flagging action" (presumably pending personnel actions) against the member. A medical board addendum approved on March 8, 1978, confirmed the original diagnosis and, after noting the member's requirement for hospitalization, again recommended referral of his case to a PEB. On March 9, 1978, the Commander, Medical Holding Company, FAMC, declared that there were no further unfavorable personnel actions pending against the member that would bar his disability processing under AR 635-40.

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The PEB hearing the member's case recommended he be separated from the military service without entitlement to disability benefits from the Army. The PEB's rationale was that the member's illness developed during a period of incarceration and subsequent to a court-directed dishonorable discharge and total forfeiture of all pay and allowances. The PEB went on to recommend that if subsequent administrative action restored the member's right to basic pay for the month of November 1974 (date of origin of illness) then his illness should be found to have developed while entitled to basic pay and he would be entitled to receive disability benefits from the Army.

Several questions are asked the essence of which is: Was the member entitled to basic pay in November 1974, either as a result of his military status at that time or by reason of his being retroactively restored to a pay status upon the reversal of his original court-martial conviction? If it is determined that he was in a pay status in November 1974 when his disability was incurred, we are asked to determine whether he is eligible under 10 U.S.C. 1201 or 1203 (1976) for disability retirement or severance pay.

The member's 2-year enlistment expired on March 30, 1973, prior to the time he was determined to have incurred the disability. At the time he incurred the disability he was in confinement awaiting appellate review of the original court-martial sentence. Because of the nature of that sentence (confinement for life and dishonorable discharge) and the fact that the Court of Military Appeals was reviewing it, the sentence could not be executed until it was affirmed by that court. 10 U.S.C. 871(c) (1976). We have held that the status of the accused in such circumstances must be considered for pay purposes the same as that of a prisoner in confinement awaiting court-martial trial. 40 Comp. Gen. 202 (1960).

It has long been the rule that the pay and allowances of an enlisted person whose term of enlistment expires while in confinement awaiting trial by court-martial terminate on the date of the expiration of enlistment and do not accrue to the member while subject to military control and in confinement after the expiration of the enlistment, unless the person is acquitted and, therefore, considered to have been held for the convenience of the Government. 40 Comp. Gen. 202, 204, and cases cited therein. Thus, in November 1974

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this member was clearly not entitled to pay and allowances, his enlistment having previously expired. Furthermore, the subsequent action of the Court of Military Appeals was not an acquittal so as to entitle the former member to pay based on the theory that he was held over for the convenience of the Government.

Concerning the effect of the reversal of the conviction, 10 U.S.C. 875(a) (1976) provides as follows:

"(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing." (Emphasis added.)

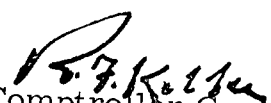
The member's original sentence included forfeiture of all pay and allowances. However, at the time he incurred the disability he was not being deprived of pay and allowances due to the court-martial sentence; instead his nonentitlement to pay and allowances at that time arose by operation of law since his enlistment had expired. Therefore, the reversal by the Court of Military Appeals could not "restore" to the member pay and allowances for November 1974 under 10 U.S.C. 875(a) since he was not deprived of pay and allowances during that period by the court-martial sentence. See 40 Comp. Gen. 202, and B-113109, January 30, 1953. Thus, he cannot be considered to have incurred his disability "while entitled to basic pay" as required under 10 U.S.C. 1201 and 1203, and he is not entitled to disability retired pay or severance pay.

The Deputy Assistant Secretary also asks whether the member would have been entitled to basic pay even after his term of service had expired if he had been restored to duty.

We have held that an enlisted member whose enlistment expires during the period he was ordered to resume regular duties pending appellate review of his court-martial sentence including forfeiture of pay and allowances, is entitled to pay and allowances until the termination of the duty status. 37 Comp. Gen. 591 (1958), and see

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also, 36 Comp. Gen. 564 (1957), 37 Comp. Gen. 228 (1957), and 54 Comp. Gen. 862 (1975). Accordingly, if the member in this case had been restored to duty after expiration of his enlistment pending appellate review, he would have been entitled to pay and allowances during that period.


Acting Comptroller General
of the United States